RECENT CASES

BILLS AND NOTES—NEGOTIABILITY—PROVISION FOR ATTORNEY'S FEES.—MACKINTOSH V. GIBBS ET AL., 80 ATL., 554 (N. J.).—*Held,* that the negotiability of a note is not affected by a stipulation that, on suit or employment of an attorney to enforce it, an additional sum of six per cent. on principal and interest shall be paid as attorney's fees.

Courts and text-writers are one in declaring that a note, in order to be negotiable, must be certain in amount. *Parsons v. Jackson,* 99 U. S., 434; *Phila. Bank v. Newkirk,* 2 Miles (Penn.), 442; *Story on Bills* §§42-45; 1 *Parsons' Notes and Bills,* 37. Taking the ground that prior to the maturity of the note. and while it is current in the business world. the provision is inoperative, and that it is sufficient if the amount is certain which will discharge the note if paid when due, courts have repeatedly held that such a provision is not fatal to the negotiability of the note. *Gehlbach v. Carlinville Nat. Bank,* 83 Ill., 129; *Shenandoah Nat. Bank v. Marsh.* 89 Ia., 273; *Schlesinger v. Arline,* 31 Fed., 648. The courts which oppose this doctrine do so on the ground that such stipulations defeat the essential requisite of negotiability—definiteness of amount payable. *First Nat. Bank v. Larsen,* 60 Wis., 206; *Roads v. Webb,* 91 Me., 406; *Amer. Mach. Co. v. Druge,* 82 Ver., 476. In *Woods v. North,* 84 Penn., 409, a note of this character was declared non-negotiable, though the sum to be used for attorney's fees was fixed and certain. And yet there are a number of states holding such notes negotiable even though the amount to be collected is indicated only by such indefinite words as "costs for collection", "reasonable attorney's fees", etc. *Montgomery v. Crossthwait,* 90 Ala., 553; *Goar v. Louisville Banking Co.,* 74 Ky., 180; *Stoneman v. Pyle,* 35 Ind., 103.

CARRIERS—EJECTION OF PASSENGER—INVALID TICKET—FORM OF ACTION FOR WRONGFUL EJECTION.—BALTIMORE AND OHIO R. CO. V. THORNTON, 188 FED., 868.—*Held,* a passenger who without fault on his part, but through the mistake or negligence of an agent of a railroad company. has been given an invalid ticket, and in consequence is ejected from a train for which he has paid fare, may recover damages therefore from the company, whether the action is on the contract or in tort.

There is a radical conflict of authority as to form of action of a passenger ejected from a train because of invalid or insufficient ticket. Some courts hold that a passenger's only remedy for negligence of the ticket agent is by an action for breach of contract. *McKay v. Ohio River R. Co.,* 34 W. Va., 65; *Lexington & E. R. Co. v. Lyons,* 104 Kentucky, 23; *Peabody v. Oregon R. & Nav. Co.,* 21 Ore., 121. But the weight of authority is, as in the principal case, that when the passenger acted in good faith and is without fault, he may sue the carrier for agent's mistake either in tort or on contract. *Ellesworth v. Chicago, etc., R. Co.,* 95

Ia., 98; *Louisville, etc., R. Co. v. Gaines,* 99 Ky., 411; *Chicago, etc., R. Co. v. Spirk,* 51 Nebr., 167; *Trice v. Chesapeake, etc., R. Co.,* 40 W. Va., 271; *Lake Erie, etc. R. Co. v. Fix,* 88 Ind., 381. However, when plaintiff has himself been at fault tort action is denied. *Dietrich v. Pa. R. Co.,* 71 Pa., 433; *Chicago, B. & Q. R. Co. v. Griffin,* 68 Ill., 499.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—REGULATION OF TRADING STAMP BUSINESS.—STATE V. GASPARE ET AL., 80 ATL., 606 (MD.).—*Held,* a corporation engaged in supplying trading stamps for use by merchants to increase their business, and engaged in redeeming the stamps supplied by merchants to their customers on presentation, is engaged in a lawful business, and, to justify the state in regulating it, it must appear that the interests of the public generally require legislative interference, and the means are reasonably necessary to the purpose and not unduly oppressive, or the regulations will be repugnant to the Fourteenth Amendment of the Federal Constitution.

The great current of authority supports the trading stamp business; that, when honestly conducted, it involves no element of chance, uncertainty, or contingency such as to render it obnoxious or dangerous to the public welfare. *Commonwealth v. Sisson,* 178 Mass., 578; *Humes v. Little Rock,* 138 Fed., 992; *Hewin v. Atlanta,* 121 Ga., 723; *Winston v. Hudson,* 135 N. C., 286; *Contra, Lansburg v. District of Columbia,* 11 App. D. C., 512. It makes no difference whether the stamps are redeemable by the selling merchants or third party. *State v. Dodge,* 76 Vt., 197. But if stamps are redeemable in articles of unknown or uncertain value, then the legislative regulation is valid. *Dunn v. People,* 40 Ill., 465. Furthermore, most courts hold that legislative attempts to regulate this business by means of license taxes, as in the case of questionable enterprises, are unconstitutional. *Ex parte McKenna,* 126 Cal., 429; *Ex parte Hutchinson,* 137 Fed., 949; *Montgomery v. Kelly,* 142 Ala., 552. A few states, however, hold such legislation constitutional. *Fleetwood v. Read,* 21 Wash., 547; *Humes v. Ft. Smith,* 93 Fed., 857. And in Canada a similar doctrine has been expressed. *Wilder v. Quebec,* Rap. Jud. Quebec, 25, C. S., 128.

FISH—CONSTITUTIONAL AND STATUTORY PROVISIONS.—STATE V. KOFINES, 80 ATL., 432, (R. I.).—*Held,* that *Pub. Laws* 1909, c. 437, par. 1, prohibiting any person from taking any lobster from the waters of the state, or maintaining any pot or contrivance to take lobsters, unless licensed to do so, and section 2, authorizing the commissioners of inland fisheries to grant or refuse licenses to such citizens of the state as have resided therein for at least one year as they may think proper, subject to revocation on violation of any of the provisions of the act, are within the police powers of the state, and do not, either as to citizens of the state or aliens, violate Const. art. 1, par. 17, providing that the people of the state shall continue to enjoy and freely exercise all the rights of fishery and the privileges of the shore to which they have been entitled under the charter

and usages of the state, but that no new right is intended to be granted by this declaration. Blodgett, J., *dissenting.*

Statutes are held to be constitutional unless there is clear proof to the contrary. *Mobile Dry Docks Co., et al., v. The City of Mobile,* 146 Ala., 198; *Stillwell v. Jackson,* 77 Ark., 250. And a statute otherwise unconstitutional as affecting property rights is valid if it comes within the scope of the police powers of the state. *Bertholf v. O'Reilly,* 74 N. Y., 509; *Sibley v. State,* 107 Tenn., 515; *Thorpe v. R. & B. R. R. Co.,* 27 Vt., 140. A state by virtue of these powers may enforce statutes for the protection of fish and game. *People v. Bridges,* 142 Ill., 30; *Burnham v. Webster,* 5 Mass., 266; *State v. Woodward,* 123 N. C., 710. So acts making unlawful or limiting the use of certain fishing contrivances are valid. *People v. Collison,* 85 Mich., 105; *Lawton et al., v. Steele,* 119 N. Y., 226; *Peters v. State,* 96 Tenn., 682. And the Legislature may delegate its power over fisheries to commissioners or local boards. *Smith v. Levinus,* 8 N. Y., 472; *Reed v. Dunbar,* 41 Or., 509; *State v. Cozzens,* 2 R. I., 561. But all similar bodies should not have unlimited and uncontrolled discretion. *Mayor, etc., of Baltimore v. Radecke,* 49 Md., 217; *State ex rel., etc., v. Cincinnati Gas Light & Coke Co.,* 18 Ohio St., 262. And the state may limit these privileges of fishing to residents and citizens. *State v. Hanlon,* 77 Ohio St., 19; *Chambers v. Church,* 14 R. I., 398; *McCready v. Virginia,* 94 U. S., 391. But it must not exercise arbitrary discrimination against any person or class of persons within its jurisdiction. *State v. Higgins,* 51 S. C., 51; *in re Ah Chong,* 6 Sawy., 451; *Bittenhaus v. Johnston,* 92 Wis., 588.

INSURANCE—INSURABLE INTEREST—ASSIGNMENT.—MANHATTAN LIFE INS. CO. V. COHEN, 139 S. W., 51, (TEX.)—*Held,* that an assignment of a life policy to one without an insurable interest is valid only to the extent of reimbursing the assignee for the amounts paid out by him with interest, being, except to that extent, a mere gambling contract, and contrary to public policy.

There is considerable conflict of authority on this point. The rule laid down in the principal case is upheld by the following cases: *Hays v. Lapeyre,* 98 La., Ann., 749; *First National Bank v. Terry's Adm'r.,* 99 Va., 194; *Strode v. Meyer Co.,* 101 Mo. App., 627. A few cases hold that an assignment to one without an insurable interest avoids the policy. *East Missouri Valley Ins. Co. v. McCrum,* 36 Kan., 146. But other courts hold that a policy taken out in good faith, and not for the mere purpose of assignment, is assignable to one having no insurable interest, and the assignee, where the assignment is absolute and general, will be entitled to the entire proceeds of the policy. *Steinback v. Diepenbrock,* 158 N. Y., 24; *Rylander v. Allen,* 125 Ga., 206; *New York Ins., Co. v. Armstrong,* 117 U. S., 591; *Farmers' Bank v. Johnson,* 118 Ia., 282. But this is not true if the assignment is merely to cover a wager policy. *Fitzpatrick v. Hartford Ins. Co.,* 56 Conn., 116. An assignment to one without an insurable interest, of a policy taken out in contemplation of assignment, is void as between insurer and assignee. *Steinback v. Diepenbrock, supra; Powell*

v. Dewey, 123 N. C., 103. And between assignee and beneficiary. *Vanormer v. Hornberger,* 142 Pa., 575. But it does not avoid the policy as between beneficiary and insurer. *New York Ins. Co. v. Brown's Adm'r.,* 23 Ky., L. Rep., 2070; *Merchants' Ins. Ass'n. v. Yoakum,* 98 Fed., 251. An assignment to a creditor who has no other insurable interest in the life of the assured is valid where the amount of the debt is not disproportionate to the face of the policy. *Givens v. Veeder,* 9 N. M., 256; *McHale v. McDonnell,* 175 Pa., 632.

INSURANCE—MUTUAL BENEFIT SOCIETY—METHOD OF CHANGE OF BENEFICIARY.—HOLDEN V. MODERN BROTHERHOOD OF AMERICA, 132 N. W., 329 (IOWA).—*Held,* that a fraternal beneficiary association may stipulate methods and conditions by and under which a substitution of beneficiaries may be effected, and, unless such methods and conditions are adopted and complied with, no substitution will take place.

The general rule is that whatever formalities a mutual benefit association prescribes as to change of beneficiaries must be observed and complied with. *Shuman v. A. O. U. W.,* 110 Iowa, 642; *Gordon v. Gordon,* 117 Ill. App., 91. *Fink v. Fink,* 171 N. Y., 616. And the expression of one method impliedly excludes all others. *Coleman v. Knights of Honor,* 18 Mo. App., 189; *Flowers v. Sovereign Camp, W. of the W.,* 40 Tex. Civ. App., 593; *Grace v. Northwestern Mutual Relief Ass'n,* 87 Wis., 562. So the weight of authority holds that a change cannot be made by the will of the member. *Stephenson v. Stephenson,* 64 Iowa, 534; *McCarthy v. N. E. Order of Protection,* 153 Mass., 314. But, *Catholic Benefit Ass'n v. Priest,* 46 Mich. 429, and *Masonic Benefit Ass'n v. Bunch,* 109 Mo., 560, hold *contra,* when such change is not expressly forbidden. But these rules must not be impossible of fulfilment. *Grand Lodge v. Child,* 76 Mich., 163. And the change is valid where it is beyond the power of the member to comply literally, through loss of the certificate. *Isgrigg v. Schooley,* 125 Ind., 94; *Marsh v. Am. Legion of Honor,* 149 Mass., 212; *Lahey v. Lahey,* 174 N. Y., 146. The association may waive compliance, or be estopped to assert noncompliance. *Delaney v. Delaney,* 175 Ill., 187; *Wandell v. Mystic Toilers,* 130 Iowa, 639; *Manning v. A. O. U. W.,* 86 Ky., 136. Likewise the original beneficiary may be estopped. *Supreme Conclave v. Capella,* 41 Fed., 1; *Munshall v. Daly,* 37 Ill. App., 628. And where the member has done all in his power to comply, but dies before the new certificate is issued, the change will be enforced. *Sanborn v. Black,* 67 N. H., 537; *Luhrs v. Luhrs,* 123 N. Y., 367; *Waldum v. Homstad,* 119 Wis., 312.

SPECIFIC PERFORMANCE—MUTUALITY OF REMEDY—OPTION CONTRACT.—NAYLOR V. PARKER, 139 S. W., 93, (TEX.)—*Held,* that an option, based on a valuable consideration moving from the holder of the option, even though it imports no obligation on the holder to purchase, is an exception to the rule that, if a contract can not be specifically enforced against the one seeking enforcement, he is not entitled to such remedy as against his adversary. Dunklin, J. *dissenting* in part.

In general specific enforcement of a contract will not be decreed unless the contract could be enforced by either party against the other. *Buck*

v. Smith, 29 Mich., 166; *Martin v. Platt,* 5 N. Y. St., 284. But where a quality necessary to make specific performance possible, though originally lacking, is subsequently supplied, specific performance will be decreed. *Woodruff v. Woodruff,* 44 N. J. Eq., 349; *Sayward v. Houghton,* 119 Cal., 545. This seems to be the real ground for the decision in the leading case, and similar cases. An option contract is converted into a contract of sale, which may be specifically enforced, by an acceptance by the offeree, within the time agreed upon. *Couch v. McCoy,* 138 Fed., 696; *Jones v. Barnes,* 94 N. Y. Supp., 695; *Chadsey v. Condley,* 62 Kan., 853. But specific performance will not be decreed where there has not been such an acceptance. *Pollock v. Brookover,* 60 W. Va., 75. And the acceptance must be in exact accord with the terms of the option. *Henry v. Black,* 213 Pa., 620; *Pollock v Brookover, supra.* But specific performance will be decreed though there be no consideration for the offer, where it was not withdrawn before acceptance. *R. R. Co. v. Bartlett,* 3 Cush., 224; *Perkins v. Hadsell,* 50 Ill., 216. *Contra, Litz v. Goosling,* 93 Ky., 185.

STATUTES—UNCONSTITUTIONAL STATUTE—EFFECT.—EX PARTE BOCKHORN, 138 S. W., 706, (TEX.).—*Held,* that, since an unconstitutional act is void from its inception, neither conferring rights, imposing duties, nor affording protection, an act imposing a license tax on sellers of sewing machines, unconstitutional in its inception as discriminating and non-uniform, was not rendered valid by the subsequent repeal of the part of the act rendering it unconstitutional.

The general rule is that an act amending an invalid or unconstitutional act is void. *Cowley v. Rushville,* 60 Ind., 327; *Plattsmouth v. Murphy,* 74 Neb., 749. But if the act is unconstitutional merely from a failure to comply with the constitutional requirements in enacting it, it may be amended into a valid act. *Ferry v. Campbell,* 110 Ia., 290; *Walsh v. State,* 142 Ind., 357. And if a statute, constitutional when passed, is made invalid by the adoption of a new constitution, it may be amended to comply with the new constitution. *Railway Co. v. Adams,* 33 Fla., 608. Where only a section or part of a section of an act is unconstitutional, the act may be amended by removing the objectionable part or substituting another section, the effect being to re-enact the old act with the amendment. *State v. Cincinnati,* 52 Ohio St., 419; *Lynch v. Murphy,* 119 Mo., 163; *State v. Corbett,* 61 Ark., 226. An act, although it purports to amend an unconstitutional act, if it is complete in itself, is valid. *People v. Onahan,* 170 Ill., 449; *People v. Canvassers,* 143 N. Y., 84; *Mortgage Co. v. Hardy,* 93 Tex.. 300. In *Columbia Wire Co. v. Boyce,* 104 Fed., 172, there is a dictum that an act, though invalid for any reason, may be amended. One recent case holds that an unconstitutional statute may be amended into a valid act by mere reference to it, for it is not properly void and nonexistent, but merely unenforceable. *Allison v. Corker,* 67 N. J. Law, 596.

SUNDAY—OPENING STORE—SCOPE OF STATUTE.—STATE V. MORIN, 80 ATLANTIC, (ME.), 751.—*Held,* Rev. St. c., 125, 25, prohibiting the keeping open of a store on Sunday, does not prohibit a druggist to go into his

store to compound a prescription in case of sickness, or to do an act of necessity or charity; the statute merely prohibiting keeping open to invite trade, transaction of business, or work in the store.

The rule laid down by the principal case is supported by the weight of authority. The rule as stated in *Doyle v. Lynn & B. R. Co.*, 118 Mass., 195, is that, whatever proceeds from a sense of moral duty or a feeling of kindness and humanity, and is intended wholly for the purpose of the relief or comfort of another, and not for ones own benefit, is not within the meaning of the statute. In the case of *Western Union Telegraph Co. v. Yopst*, 118 Ind., 248, it was held, that in determining whether an act is within the meaning of the statute, it is proper to give just effect to the nature of the business in which the person who does it is engaged. In a Kansas case, the delivery of milk by a dairyman on Sunday, was deemed to be a work of necessity and not prohibited by the Sunday law. *City of Topeka v. Hempstead*, 58 Kans., 328. When a property right is in danger, work done on Sunday to prevent loss, is deemed a work of necessity. *Johnson v. People*, 42 Ill. App., 594; *Morris v. State*, 31 Ind., 189. The running of trains carrying mail, freight, and perishable property has been held a work of necessity. *Commonwealth v. Rob*, 14 Pa. Co. Ct. R., 473. Likewise work done on Sunday, for public safety. *Flag v. Inhabitance of Millburg*, 58 Mass., 243. In the case of *Commonwealth v. Harrison*, 77 Mass., 308, a shop was deemed to be open on Sunday if all who please can obtain access thereto to buy, although the entrance is closed. Merely keeping the doors of a store open on Sunday, without traffic is not a violation of a code which punishes one who keeps "open store on Sunday". *Snyder v. State*, 59 Ala., 64.